CASE NO. 83-1261

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

WILLIAM C. LYDDAN,

Plaintiff-Petitioner,

-against-

UNITED STATES OF AMERICA,

Defendant-Respondent.

PROCEEDING BROUGHT FOR REFUND OF FEDERAL INCOME TAXES. ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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Plaintiff-Petitioner,

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QUESTIONS PRESENTED

1. In order to be considered "separated" for purposes of the alimony pendente lite deduction allowed by §§71(a)(3) and 215 of the Internal Revenue Code, must spouses maintain separate residences?

2. For purposes of the so-called "head of household" income tax rates, which are lower than the otherwise

applicable "married filing separately" rates, may spouses living in the same "house" nevertheless be members of different "households?"

3. Was the finding of fact of the trial court (affirmed by the Court of Appeals) that petitioner was not under court order to allow his then wife to live in his house "clearly erroneous?"

PARTIES

The names of all parties appear in the caption of the case.

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JURISDICTIONAL GROUNDS

The judgment of the Second Circuit Court of Appeals sought to be reviewed was dated and entered on November 1, 1983. This Court is believed to have jurisdiction to review this judgment by writ of certiorari pursuant to Title 28, United States Code, §1254(1).

STATUTORY PROVISIONS

This case involves §§71, 143 and 215 of the Internal Revenue Code of 1954 (Title 26, United States Code), which are quoted verbatim in the appendix herein.

STATEMENT OF THE CASE

A comparison of the present case with

Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978), shows that the Second Circuit Court of Appeals has answered yes to the first question presented herein while the Eighth Circuit Court of Appeals has answered no. If this Court is of the view that resolving this conflict between the Second and Eighth Circuits is sufficient reason for granting certiorari there is no need to read further in this petition. If it doesn't consider this conflict sufficient in itself to warrant review, this Court is respectfully requested to bear with counsel in considering this lengthy petition because of the many complicating factors which will appear.

Preliminarily, one of the main points of this petition is that the existence of a court order requiring payment of alimony pendente lite, in the context of matrimonial litigation, provides a perfectly adequate "bright line" test of whether the

spouses are separated. As will be mentioned further along, seven judges of the United States Tax Court support this position, which makes unnecessary any inquiry into the living arrangements of the spouses as must be done under the "separate residences" test put forward by the Internal Revenue Service. Therefore petitioner includes in this Statement of the Case the following stipulated and/or undisputed evidentiary facts in some detail only to provide this Court with factual background and to support petitioner's claim that the trial court's finding that no court order existed requiring petitioner in 1971 to allow his wife to live in his house was erroneous.

The tax year involved in this refund suit is 1971. By admissions dated May 11, 1982 the defendant agreed that petitioner, William C. Lyddan, and Dr. Kopenhaver were married February 26, 1970 and that five

months later, on July 31, 1970, Dr. Kopenhaver sued William C. Lyddan for $250,000 and for equitable support, also requesting support and custody of an unborn child allegedly conceived by them, and that thereafter an order was entered in that action on September 25, 1970 requiring William C. Lyddan to pay $600 a month to Dr. Kopenhaver as alimony pendente lite. The defendant further admitted that on September 24, 1970 William C. Lyddan sued Dr. Kopenhaver for an annulment and custody of any afterborn child of theirs, which action was discontinued on January 18, 1971 afterwhich on January 19, 1971, the next day, William C. Lyddan sued Dr. Kopenhaver for divorce. The defendant further admitted that the judge who tried these actions in 1972 found that there were no children of the marriage, found against Dr. Kopenhaver in the equitable support action and granted William C.

Lyddan a divorce from Dr. Kopenhaver on the grounds that Dr. Kopenhaver had been guilty, on divers days between February 26, 1970 and July 11, 1972 of intolerable cruelty to William C. Lyddan.

It is beyond dispute that the record herein shows that plaintiff Lyddan testified at the trial before Senior Judge Thomas F. Murphy four times that he was under court order to allow Dr. Kopenhaver to reside in his house pending the outcome of his action for divorce. It is further beyond dispute that the record herein shows that government counsel in the course of the trial asked no questions whatsoever regarding the existence of this court order either on cross-examination of plaintiff Lyddan or on direct examination of government counsel's own witness, Dr. Kopenhaver, and that government counsel did not question in any way the existence of such a court order in their post-trial

memorandum, although government counsel had been on notice for two years prior to the trial that petitioner claimed to be under such a court order. It is further beyond dispute that the record herein shows that plaintiff Lyddan, while testifying that he was under "court order" to allow Dr. Kopenhaver to reside in his house pending the outcome of his action for divorce, at no time testified that the "alimony order" required that he allow Dr. Kopenhaver to reside in his house pending the outcome of his action for divorce. It is further beyond dispute that the record herein shows that the taxpayer testified in effect that there were two provisions of the court order; one which required him to allow his then wife to live in his house and one which required him to pay alimony pendente lite to her. It is further beyond dispute that the record herein shows that the taxpayers,

not the defendant, introduced an alimony decree into evidence at the trial herein. It is further beyond dispute that the record herein shows petitioner testified, and his then wife did not deny, that she behaved in an extremely bizarre manner during the marriage and that immediately following their divorce petitioner put her out of his house.

At page 46 of the appendix herein is a copy of a court record on file in the Superior Court of the State of Connecticut, duly attested and certified in accordance with the requirements of Rule 44(a)(1), Federal Rules of Civil Procedure, of which this Court may now take judicial notice pursuant to Rule 201(f) of the Federal Rules of Evidence. U.S. v. Ashe, 90 F.S. 463 (D.C.Pa. 1950) (judicial notice of the records of the Superior Court of Connecticut) and Moore's "Federal Practice" vol. 10 §201.60.

This court record is a transcript of the hearing at which Judge Otto H. LaMacchia of the Superior Court of Connecticut ordered petitioner to pay all of the expenses of maintaining his house and to allow Dr. Kopenhaver, his then wife, to live in his house. Defendant is entitled to be heard on this question of judicial notice (Rule 201(e) Federal Rules of Evidence) but defendant can cite nothing on or off the record that will not tend to prove the taxpayer herein was under court order to permit his then wife to live in his house during all of 1971.

It is further beyond dispute that the record herein shows that this refund suit, Lyddan v. U.S.A. was commenced in December 1976, five months before the first decision in the Sydnes case which was dated May 12, 1977 (68 T.C. 170 (1977).

It is further beyond dispute that

the trial court, with all due respect, made numerous errors, misspelling names, incorrectly stating that Lyddan and Kopenhaver attended a football game and reception in 1971, the tax year in question when they averredly were separated (both parties claimed it was in 1970), and incorrectly stating that plaintiff's "Concise Statement of Fact" was 30 pages long when in fact it was only two and one-half pages long.

REASONS FOR ALLOWANCE OF THE WRIT

1. Summary of Reasons. The Second Circuit Court of Appeals did not resolve the issue of whether the trial court's findings of fact were "clearly erroneous" but instead decided as a matter of law that spouses could not be considered separated while

living in the same residence. That court therefore expressed its disagreement with the Eighth Circuit Court of Appeals, which ruled to the contrary in Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978). Petitioner respectfully requests this Court to decide which of these two Courts of Appeals applied the correct legal principle. See Rule 17.1(a), Rules of the Supreme Court of the United States.

As this Court said in a somewhat analogous situation, the Internal Revenue Code should "...be interpreted so as to give a uniform application to a nation-wide scheme of taxation." Burnet v. Harmel, 287 U.S. 103, 110 (1932). In accordance with this principle, §71(a)(3) IRC, which allows a deduction for alimony pendente lite, should have the same meaning for taxpayers everywhere in the United States.

In addition, by resolving the conflict

between the Second and Eighth Circuits this Court can also simplify the task of the U.S. Tax Court which, in accordance with its present practice, must follow the Sydnes decision in cases appealable to the Eighth Circuit Court of Appeals and the contrary decision below in cases appealable to the Second Circuit Court of Appeals. Golsen v. Commissioner, 54 TC.70(1970).

Also, petitioner believes the decision below is out of harmony with the decision of this Court in Commissioner v. Lester, 366 U.S. 299 (1961), which, in an analogous situation also involving §71 IRC, applied the principle that income should be taxed to the individual who has control over spending the income. In part because of this principle the Lester decision held that payments made by the husband to the wife in the context of a matrimonial dispute, which the wife was free to spend on herself without any

express requirement that the payments be spent on the couple's children, should be taxed to the wife (and deducted by the husband). By contrast the decision below held that the husband should be taxed on payments which he made to his wife pursuant to court order which she was free to dispose of as she saw fit. While a different subsection of §71 IRC was involved in the Lester case, and different statutory language, petitioner believes that the same basic principle which guided this Court in interpreting the subsection involved in the Lester case will guide this Court in the present case to conclude that the Eighth Circuit Court of Appeals in the Sydnes case correctly interpreted the subsection here involved.

Also, the legislative history of §71(a)(3), brought to light in this case for the first time, indicates that Congress showed no concern at all for the

problem of duplicate living expenses in allowing a deduction for alimony pendente lite. Instead, Congress had in mind entirely different purposes. First, to tax alimony to the recipient who was free to enjoy it, and second to keep the payor of the alimony out of artificially high or even confiscatory tax brackets the payor would be in if required to include in gross income, or "gross up," the alimony payments. These policies are fostered by allowing the deduction for alimony pendente lite whether the spouses live under the same roof or at opposite ends of the earth.

Finally, the "separate roofs" issue has been a bone of contention between taxpayers and the Internal Revenue Service for over 10 years - at least since the 1973 DelVecchio case (DelVecchio v. Commissioner, 32 T.C. M.[CCH] 1153, 42 T.C. Memo. [PH] 1108 [1973]) - and has been

before the courts with increasing frequency in recent years. Hertsch v. Commissioner, 43 T.C. M.(CCH) 703 (1982), 51 T.C. Memo. (PH) 454 (1982); Washington v. Commissioner, 77 T.C. 601 (1981); Brusey v. Commissioner, 50 T.C. Memo. (PH) 533 (1981); Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978). As the concurring opinion in Commissioner v. Lester, 366 U.S. 299, 307 (1960) noted: "Resort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer." The issue has divided the U.S. Tax Court, nine judges in favor of the government's position, seven in favor of the taxpayer's. Washington, supra. And in recent correspondence between counsel of record for petitioner herein and Judge Dawson of the U.S. Tax Court, who issued the Tax Court majority opinion in Washington, supra, Judge Dawson stated

that if the U.S. Tax Court had been cited to the legislative history discussed below in this Petition for Certiorari, the decision in Washington might well have gone the other way.

2. Legislative history may be resorted to, and helps explain what Congress meant by separated. At the threshhold of this inquiry is the question whether the word "separated" used in §71 (a)(3) IRC should take its meaning from Federal or state law. Although one early case followed state law (DelVecchio v. Commissioner, supra, decisions of this Court, rulings by the Internal Revenue Service, and the legislative history of the section all point toward Federal law as the controlling authority on this issue. See Commissioner v. Tower, 327 U.S. 280, 288 (1946) and Burnet v. Harmel, 287 U.S. 103 (1932).

Petitioner would like to treat in some detail this choice of laws issue, in order to bring initially to the Court's attention some of the legislative history of subsection 71(a)(3).

In Burnet v. Harmel, this Court said:

> "Here we are concerned only with the meaning and application of a statute enacted by Congress,...It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation. (Citations omitted). State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law. (Citations omitted)". (p. 110)

The Internal Revenue Service has quoted the above portion of the opinion as authority for the proposition that Federal law, not state law, should control the interpretation of §71 IRC, the section we are concerned with in the present case. Rev. Rul. 58-192, 1958-1 C.B. 34.

The legislative history of §71 IRC also clearly supports this view. As will be discussed in greater detail further along, present §71(a)(1) IRC (the deduction for alimony, not here applicable) was originally proposed in the Revenue Bills of 1941 and 1942, and finally enacted in 1942. Present §71(a)(2) (the deduction for payments pursuant to a written separation agreement, also not here applicable) and §71(a)(3) (the deduction for payments of temporary support, here applicable) were enacted in 1954. This 1954 enactment was intended merely to extend the deduction for alimony (§71[a][1]) to payments made, as noted, pursuant to a written separation agreement (§71[a][2]) and to payments of temporary support (§71[a][3]). See Sydnes v. Commissioner, 68 T.C. 170, 175; 577 F.2d 60 (8th Cir. 1978). Section 71 (a)(2), extending the deduction to payments

made pursuant to a written separation agreement, was included in the House bill, while §71(a)(3), extending the deduction to payments of temporary support, was added by the Senate. See S. Rep. No. 1622, 83rd Cong., 2nd Sess. pages 170 and 171 and H.R. Rep. No. 1337, 83rd Cong., 2nd Sess. A21 (Detailed Discussion of the Bill). These 1954 extensions of the 1942 deduction for alimony were enacted without any contemporaneous discussion of the merits or purpose of the deduction, other than statements in the above committee reports that the deduction was being extended to include payments pursuant to a written separation agreement and payments of temporary support. In fact the House Report clearly states that no substantive change was intended, other than this extension. H.R. Rep. No. 1337, supra, A20. Consequently, the purposes originally sought to be accomplished by

the Revenue Act of 1942 in allowing a deduction for alimony are presently relevant. One of these purposes was described in the House Report as follows:

> "In addition, the amended sections will produce uniformity in the treatment of amounts paid in the nature of or in lieu of alimony regardless of variance in the laws of different States concerning the existance and continuance of an obligation to pay alimony."
> H.R. Rep. No. 2333, 77th Cong., 2nd Sess. 72.

The report of the Senate Committee on Finance is to like effect, in fact it quotes the above passage verbatim. S.Rep. No. 1631, 77th Cong., 2nd Sess. 83. Thus there is neither "express language" nor "necessary implication" that this provision of the Internal Revenue Code is dependent upon state law, as required by Burnet v. Harmel, supra, if federal law is to be supplanted. To the contrary, all indications are that Congress was seeking uniformity among the states and wished to avoid having Federal tax consequences

hinge on the varying requirements of state domestic relations law. Therefore Federal law determines the meaning of "separated" as used in §71(a)(3) IRC. (But see DelVecchio v. Commissioner, supra.)

In view of the existing conflict between the decision of the Eighth Circuit Court of Appeals in the Sydnes case and the decision of the Second Circuit Court of Appeals in this case as to the meaning of "separated" as used in §71(a)(3) IRC, it is fair to conclude that the meaning of "separated" is ambiguous.* As this Court has many times ruled, ambiguous statutory language is to be interpreted in such a way as to give effect to the

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* State courts also have been puzzled by virtually identical language in divorce cases, and also have reached opposite results. Compare Heckman v. Heckman, 245 A.2d 550 (Sup. Ct. Del. 1968) and Lillis v. Lillis, 201 A.2d 794 (Ct. of App. Md. 1964).

statutory purpose. Commissioner v. Lester, supra; Johnson v. Southern Pacific Co., 196 U.S. 1, 14-18 (1904); Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). The statutory purpose, if not evident from the statute itself, is sometimes discoverable in reports of the Congressional committees that studied the evil sought to be remedied by legislation, drafted a bill, considered its effects, and recommended its passage. Commissioner v. Lester, supra; Holy Trinity Church v. U.S., supra; Binns v. U.S., 194 U.S. 486 (495)(1903).

In this connection the Tax Court in Sydnes, supra, noted:

> "Prior to 1942, alimony payments were not taxed to the recipient and no deduction for such payments was allowed. (Citations omitted). Congress in 1942 made alimony and separate maintenance payments taxable to the recipient and deductible by the payor. (Citations omitted). However, this treatment extended only to payments made pursuant to decrees of divorce or separate maintenance or a written agreement

> incident to such divorce or separation. (Citations omitted). In 1954 Congress extended this tax treatment to payments made pursuant to a written separation agreement and a decree of support (section 71 (a)(2) and 71 (a)(3)) in order to end the "discrimination against husbands and wives who have separated although not under a court decree." (Citations omitted). (Emphasis added).

As noted earlier in connection with the conflict of laws issue, Committee reports bear out the view that the 1954 amendments were merely extensions of the 1942 law. H.R. Rep. No. 1337, 83rd Cong. 2nd Sess. A21 (Detailed Discussion of the Bill) and S. Rep. No. 1622, 83rd Cong. 2nd Sess. 171. Thus §§71(a)(1), (2) and (3) are in pari materia, and any legislative history of §71(a)(1) would shed light significantly on §§71(a)(2) and (3). As this Court said when faced with a similar problem:

> "But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise the language, cannot be ascertained if it be

> considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part." Helvering v. Morgan's, Inc. 293 U.S. 121, 126 (1934).

In that case this Court looked to preceding revenue acts to identify the meaning of the term "taxable year". Here the committee reports accompanying the 1954 extension of the alimony deduction, as previously mentioned, offer no insight into the Congressional purpose in allowing a deduction for alimony-type payments. But the committee reports accompanying the preceding enactment of the §71(a)(1) deduction for alimony do deal with this subject.

The report of the Committee on Ways and Means on the Revenue Bill of 1942 states as follows:

> "The existing law does not tax alimony payments to the wife who receives them nor does it allow the husband to take any deduction on account of alimony payments

> made by him. He is fully taxable on his entire net income even though a large portion of his income goes to his wife as alimony or as separate maintenance payments. The increased surtax rates would intensify this hardship and in many cases the husband would not have sufficient income left after paying alimony to meet his income tax obligations.
>
> The bill would correct this situation by taxing alimony and separate maintenance payments to the wife receiving them, and by relieving the husband from tax upon that portion of such payments which constitutes income to him under the present law". H.R. Rep. No. 2333, 77th Cong., 2nd Sess. 46. (Emphasis added).

The report of the Committee on Finance of the Senate is to like effect.

> "These amendments are intended to treat such payments as income to the spouse actually receiving or actually entitled to receive them and to relieve the other spouse from the tax burden upon whatever part of the amount of such payments is under the present law includible in his gross income". S. Rep. No. 1631, 77th Cong., 2d Sess. 83. (Emphasis added).

Thus Congress was concerned with two substantive problems. First, the inequity

of taxing one person on income that was in effect enjoyed by another. Second, the fact that some taxpayers might not have enough income left over after meeting alimony obligations to pay taxes.

The first such area of Congressional concern in enacting the original alimony deduction was that after the husband has been forced to turn over a portion of his income to his wife it would be rubbing salt in his wounds to make him then pay taxes on this surrendered portion of his income. As this Court observed after a review of the above-noted committee reports in an analogous case involving alimony-type payments:

> "One of the basic precepts of the income tax law is that 'the income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not'. (Citation omitted). Under the type of agreement here the wife is free to spend the monies paid under the agreement as she sees fit. 'The

> power to dispose of income is the equivalent of ownership of it'. (Citation omitted). Including the entire payment in the wife's gross income under such circumstances, therefore, comports with the underlying philosophy of the Code. And, as we have frequently stated, the Code must be given 'as great internal symmetry and consistency as its words permit'."
> Commissioner v. Lester, 366 U.S. 299 (1961) pages 301-302.

Plaintiff husband in the present case was required to pay $600 a month in temporary support to his wife, or $7,200 in all, during 1971, the tax year in question. His wife was free to spend this money in any way she saw fit, since plaintiff was, in addition, required to pay all her living expenses. Plaintiff should not be required to pay taxes on what was, in effect, his wife's income. It is submitted that if the word "separated" is construed in the way contended for by the defendant, and if the plaintiff is prevented from deducting these temporary support payments because of the circumstance that he and

his wife resided in the same house, the clearly-expressed intention of Congress to distribute the tax burden fairly would be thwarted. The "separate roofs" or "identifiable geographic separation" requirements thus inject a strained, artificial meaning into the word "separated", a meaning that serves only to frustrate the will of Congress.

The second area of Congressional concern in enacting the original alimony deduction was the burdensome effect of progressive rates of income taxation on husband's paying alimony. As the Supreme Court said after reviewing the above-cited 1942 committee reports, "...Congress realized that the increased surtax rates would intensify the hardship on the husband..." Commissioner v. Lester, supra, p. 301-302. Income used for alimony payments would not be available to the husband to pay taxes, but would

nevertheless drive the husband into higher and higher tax brackets. As a result the husband's remaining income could be taxed at confiscatory rates - in excess of 100%. The rates proposed by the Revenue Act of 1942 went as high as 82%. S. Rep. No. 1631 77th Cong., 2nd Sess. 4. In 1971, the tax year in question, rates were comparably high, going to 70%. §1 IRC (P.L. 91-172 p. 803[a]). An example, using 1971 tax levels, will illustrate the lopsided tax treatment and accompanying hardship when disallowance of the deduction is combined with high progressive rates.

Example I

No deduction allowed for periodic payments (alimony or support):

Husband's gross income	$80,000
Itemized deductions	20,000
Taxable income	60,000
Tax using married filing separately, rates (claimed to be applicable by defendant)	28,790
Husband's income after taxes, but before periodic payments to wife	31,210
Periodic payment to wife	30,000
Husband's spendable income	1,210
Wife's spendable income (no tax)	30,000

Thus the husband is left with $1,210, the wife with $30,000. By contrast, if the deduction is permitted, a more sensible, equitable result follows:

Example II

Deduction allowed for periodic payments (alimony or support):

Husband's gross income	$80,000
Itemized deduction (including $30,000 periodic payments to wife)	50,000
Taxable income	30,000
Tax using married filing separately rates	11,150
Husband's spendable income	18,850
Wife's gross income	30,000
Deductions & exemptions (assuming wife must itemize since husband does)	2,000
Taxable income	28,000
Tax	10,090
Wife's spendable income	19,910

Thus the husband is left with $18,850, the wife with $19,910. When §71(a)(3) IRC extended the deduction for alimony to temporary support payments, this was the sensible, equitable result that Congress was seeking. No reason exists for applying the lopsided, harsh tax treatment

in Example I to temporary support payments solely because both spouses are living in the same house. The only beneficiary would be the Federal government, which collects $7,815 more in income taxes in Example I than in Example II. This $7,815, of course, reduces dollar for dollar the amount of income available for division between the spouses. As this Court said in the analogous Lester case, "...the wife, generally being in a lower income tax bracket than the husband, could more easily protect herself in the agreement and in the final analysis receive a larger net payment from the husband if he could deduct the gross payment from his income." (p. 302) (Emphasis added).

While the above two examples involve a dramatically larger temporary support payment than the $7,200 payment in the present case, the same insidious process is at work here, taxing the income at a

higher rate in the hands of the payor of temporary support who has no control over how it is spent, than in the hands of the recipient who is free to enjoy it. The plaintiff paid $4,464 in taxes on the $7,200 of temporary support payments for a total of $11,664. Had the $7,200 been taxed to the plaintiff's then wife, with no deductions other than one personal exemption, the tax would be $1,261 instead of $4,464, less by $3,203. Therefore, to give effect to the will of Congress, as expressed in the above-noted committee reports, the defendant's argument that spouses living in the same house can never be considered "separated" should be rejected.

There are still further contemporaneous indications of Congress' understanding of the word "separated" which reinforce plaintiff's argument. The deduction for alimony was originally

proposed as part of the Revenue Bill of 1941, one year before it was enacted. Sen. Rep. No. 673 (Part I), 77th Cong. 1st Sess. 32. This same revenue bill also proposed mandatory joint returns by husband and wife living together. H.R. Rep. No. 1040, supra, 38. The mandatory joint return was one of many proposed solutions to the knotty problem of income-splitting in community property states, which, because of progressive rates, frequently resulted in less overall tax on the husband's income than would be paid in non-community property states. See Surrey Federal Taxation of the Family 61 Harv. L. Rev. 1097 (1948) and Sen. Rep. No. 673 (Part I) 77th Cong., 1st Sess. 36. The mandatory joint return provision was eliminated before final passage of the Revenue Bill of 1941. H.R. Rep. No. 1203, 77th Cong., 1st Sess. 10 (Statement of Managers.) But the following

description of the mandatory joint return proposal in the Report of the Committee on Ways and Means of the House of Representatives is very illuminating:

> "7. JOINT RETURN OF HUSBAND AND WIFE LIVING TOGETHER
>
> The provision - The bill as reported by your committee requires husband and wife living together at any time during their joint taxable year to report their income in a single joint return and compute the tax on their aggregate income. A husband and wife are considered living together in any case where they have not separated with intent to abandon permanently the marital relationship, whether or not the husband makes his home at one place and the wife at another place."
> H.R. Rep. No. 1040, 77th Cong., 1st Sess. 10. (Emphasis added).

and further along:

> "SECTION 111. JOINT RETURNS OF HUSBAND AND WIFE
>
> Section 111 of the bill amends sections 25(a)(4), 25(b)(3), 47(c), 47(e), 51, and 142(a) of the Internal Revenue Code, and adds new sections 278 and 300 to the Code.
>
> The section provides that a husband and wife living together at any time during their 'joint taxable year' shall report their income in a single return made by them jointly, and that the tax shall be computed on their aggregate income.

> An individual is only required to participate in a joint return if he is 'living with husband or wife' at some time during a joint taxable year. This term is intended to have a broad application. It does not require that a husband and wife live under the same roof. They are considered to be living together in any case where they have not separated with intent to abandon permanently the marital relationship, whether or not the husband makes his home at one place and the wife at another place." H.R. Rep. No. 1040 (supra) 38. (Emphasis added).

The bill could have exempted spouses in community property states from the higher income taxes that would (under that bill) have resulted from mandatory filing of a joint return, in cases where the spouses maintained separate residences. The bill would probably have done so had Congress been concerned about duplicate living expenses. But Congress was concerned about the impact of progressive income tax rates, and drew the line at separation with intent to abandon the marital relationship rather than at maintenance of separate residences. The same or a

similar line should be drawn in the present situation, since in allowing a deduction for temporary support Congress was similarly concerned with the impact of high tax rates. And the pendency of a lawsuit for divorce or legal separation establishes sufficiently an intention to "abandon the marital relationship."

In any event, clearly Congress did not think that living together or apart depended on whether spouses resided together or apart. This Committee Report, as far as plaintiff's research has disclosed, is the only existing indication of how Congress would define the terms "separated" and "living together" in the context of a Federal revenue measure. It is all the more persuasive because found in the same committee report, concerning the same revenue bill, as the proposal to allow a deduction for alimony. The latter, as the Tax Court in Sydnes

indicated, was the precursor of the deduction for temporary support, and the two provisions ought to be construed and applied harmoniously to give full effect to the will of Congress. Helvering v. Morgan's Inc., 293 U.S. 121 (1934).

By way of a further example, to entitle a taxpayer who is supporting a child to head of household rates, the child must have the same residence as the taxpayer. Conversely, to entitle a taxpayer who is supporting a parent to head of household rates, it is not necessary for the parent to have the same residence as the taxpayer. Sec. 2(b)(1) IRC. In legislating these rules, Congress does not refer to parent and child as being "separated". Instead Congress specifies that a taxpayer's child must have the same "principal place of abode" as the taxpayer, while the taxpayer's parent need not. Defendant no where explains why

Congress suddenly departed from this practice of calling a spade a spade when drafting §71(a)(3) IRC.

The 1954 committee reports accompanying the proposal to extend the alimony deduction to cover temporary support payments, as noted, are completely silent on the purpose for allowing the deduction. Had Congress been concerned about the problem of duplicate living expenses, it could have said so. For example, the 1954 report of the Senate Finance Committee broadening the alimony deduction to include temporary support payments also broadened the definition of the word dependent to include certain foster children living in a taxpayer's home, not previously considered dependents for tax purposes. The report uses such terms as "home," "principal place of abode," "Member of the taxpayer's household," "separate habitation," "lodgings...

occupied by the taxpayers," "residence of the dependent in other lodgings" and "lives in the taxpayer's home." S. Rep. No. 1622 83rd Cong., 2nd Sess. 21, 193, 194. The statutory provision, which actually incorporates the first three of the above terms, is still in the law. Section 152(a)(9) IRC. Clearly had Congress wished to express the concept of living in different residences it would not have been at a loss for the needed words.

Numerous other sections of the Internal Revenue Code contain the kind of definitive language Congress could have employed had it wished to express the concept of "separate residences" as opposed to "separate lives." Section 107 uses the phrase "rental value of a home;" §121 (a)(2) IRC the phrase "owned and used by the taxpayer as his principal residence;" §162(a)(2) the phrase "away from home;"

§217(b)(1)(B) the phrase "from the former residence to the new place of residence;" §280 A(a) the phrase "dwelling unit which is used by the taxpayer during the taxable year as a residence;" and §1034 the phrase "used by the taxpayer as his principal residence." Had Congress been concerned about "duplicate living expenses" of divorcing couples it could easily have drafted a bill to cover such situations with specificity also. This is illustrated by §123 IRC which excludes from gross income payments of insurance to defray temporary living costs in the case of a taxpayer whose principal residence has been lost in a fire or other casualty. This section refers to "...living expenses incurred for himself and members of his household resulting from the loss of use or occupancy of such residence." In fact, this exclusion, with great specificity, is even limited to the amount by

which actual living expenses after the casualty exceed the normal living expenses which would have been incurred by the taxpayer but for the casualty. §123(b) IRC.

Yet nothing in the statutory language and nothing in the underlying committee reports provides the slightest indication that Congress had in mind the problem of separate residences and duplicate living expenses. To the contrary all indications are that Congress was solely concerned first, to tax alimony to the recipient who was free to enjoy it, and second to keep the payor out of the artificially high tax brackets the payor would otherwise be in if required to include in income or "gross up" alimony payments. Both these areas of concern are present whether the spouses live under the same roof or at opposite ends of the earth.

Of course defendant's concern for

the financial problems of spouses confronted with duplicate living expenses is commendable, but defendant has not and can not point to anything in the statute, the Congressional committee reports or elsewhere indicating a Congressional concern with this problem.

3. Section 1.71-1(b)(3)(i) of the Treasury Regulations on Income Tax (1954 Code). This regulation requires that the spouses be "separated and living apart" to be eligible for the alimony pendente lite deduction, while the applicable statute, §71(a)(3) IRC requires only that the spouses be "separated." Petitioner contends that even the stricter requirement of the income tax regulations may be met by spouses occupying the same dwelling unit. As noted, petitioner is supported in this contention by the 8th Circuit Court of Appeals, in Richard J. Sydnes v.

Commissioner of Internal Revenue, 577 F.2d 60 (8th Cir. 1978). The Court's opinion, by Senior Circuit Judge Van Oosterhout, states:

> "The Tax Court's disallowance of maintenance and support payments made under the support order is based upon its determination that the parties were not living separately during the pertinent period. The Tax Court holds:
>
> > We conclude that "separated" as used in the statute and "separated" as used in the regulations mean living in separate residences. Only when living in separate residences do the parties incur the duplicate living expenses normally incurred by divorced or separated couples.
>
> We disagree with such holding to the extent that it holds that under no facts and circumstances can husband and wife live separately in the same residence. Neither the statute nor the regulations specifically state that in order to live separately or apart the parties cannot occupy separate quarters in the same residence. We believe the issue of whether the parties are living separately in the same residence presents a factual issue."

Not only is the regulation inconclusive on this issue; even if it were conclusive

and by its terms foreclosed plaintiff, this Court would not be required to follow it. This regulation was promulgated under the enforcement powers of the Secretary of the Treasury (§7805(a) IRC), not under the "quasi-legislative" powers such as were involved in Thor Power Tool Co. v. Commissioner, 439 U.S. 522 (1979). Speaking of the law-interpreting as opposed to the law-making nature of the Secretary's enforcement powers, this Court said in U.S. v. Cartwright, 411 U.S. 546, 550 (1973):

> "We recognized that this Court is not in the business of administering the tax laws of the Nation. Congress has delegated that task to the Secretary of the Treasury, 26 USC, sec. 7805(a), and regulations promulgated under his authority, if found to 'implement the congressional mandate in some reasonable manner,' must be upheld (citation omitted). But that principle is to set the framework for judicial analysis; it does not displace it. We find that the contested regulation is unrealistic and unreasonable, and therefore affirm the judgment of the Court of Appeals."

The reason the Treasury regulation in Cartwright was found to be "unrealistic and unreasonable" was because it appeared to be at odds with "basic notions... embodied in the Internal Reve ıe Code." Cartwright, supra, page 553. The same may be said of the regulation in issue in this case, as interpreted by the court below. The previously-cited committee reports noted that one of the purposes of §71(a)(3) IRC was to tax alimony to the spender of the alimony. After reviewing these same committee reports, this Court said in Commissioner v. Lester, 366 U.S. 299, 301-302 (1961):

> "One of the basic precepts of the income tax law is that 'the income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not'. (Citation omitted). Under the type of agreement here the wife is free to spend the monies paid under the agreement as she sees fit. 'The power to dispose of income is the

> equivalent of ownership of it'. (Citation omitted). Including the entire payment in the wife's gross income under such circumstances, therefore, comports with the underlying philosophy of the Code. And, as we have frequently stated, the Code must be given 'as great internal symmetry and consistency as its words permit'."

Clearly if §1.71-1(b)(3)(i) is interpreted to disallow the alimony deduction claimed by the plaintiff herein, that regulation would conflict with these "basic notions" of the Internal Revenue Code and would be invalid under the Cartwright test. Therefore the interpretation given this regulation by the Eighth Circuit Court of Appeals in Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978), to the effect that spouses can be "separated and living apart" although occupying the same residence, avoids any conflict between the regulation and the Internal Revenue Code, which conflict might invalidate the regulation. See Manhattan Co. v. Commissioner of

Internal Revenue, 297 U.S. 129, 134 (1936) in which this Court observed that a regulation "out of harmony with the statute, is a mere nullity."

4. Administrative convenience. The existence of a state court order requiring support payments provides a ready test to determine whether spouses are separated. This position was taken by Judge Sterrett in his dissent in a recent "separate roofs" case. See Washington v. C.I.R., 77 T.C. 601 (1981). Judge Sterrett argued there is no need to look behind such a support decree - it would call for nightmarish inquiries into the circumstances of deteriorating marriages and would work to the disadvantage of taxpayers unable to afford separate residences. Washington, supra, 607. The dissenting judges also pointed out that Congress was not concerned with the problem of duplicate living

expenses when the deduction for alimony (§71(a)(1) IRC) was enacted, since after actually divorcing, the previously-married individuals could without question deduct alimony even if occupying the same residence. §71(a)(1) IRC. Washington, supra, 606. This point reinforces the petitioner's arguments based on legislative history. (Incidentally the Washington case indicates that as of September 17, 1981 [the date of the decision therein] nine judges of the U.S. Tax Court approved of the "separate roofs" requirement while seven [including Chief Judge Tannenwald] were opposed to it).

Therefore the position taken by the taxpayer in this controversy better serves the ends of administrative convenience than the position taken by the government, since the latter requires an unnecessary investigation of the living arrangements of the parties even though

one of the parties has gone to the length of obtaining a court order requiring payments of support money, etc., by the other. And what if the parties, although wealthy enough to meet the "separate roofs" requirement nevertheless lead "joint" rather than "separate" lives, continuing to associate with one another and holding themselves out as man and wife? Compare Reilly v. Reilly, 57 R.I. 432, 190 A.476 (Sup. Ct. R.I. 1937) and Adams v. Adams, 89 Idaho 84, 403 P.2d 593 (Sup. Ct. Idaho 1965). Would they automatically be considered "separated" for purposes of §71 (a)(3) because they were incurring duplicate living expenses? Or would still further "nightmarish" inquiries be necessary?

Petitioner in no way belittles the magnitude of the task of enforcing the revenue laws, or questions the need for administrative convenience. However, the

Internal Revenue Service promulgates income tax regulations to enforce laws passed by Congress, not to make laws itself. §7805(a) IRC. Such a regulation is "...only a step in the administrative process. It does not, and could not, alter the statute." Manhattan Co. v. Commissioner, 297 U.S. 129, 135 (1936). It may not encroach upon the legislative power of Congress by citing administrative convenience. And in any event the Internal Revenue Service has argued for or against administrative convenience depending on which approach best served to swell the revenue. Compare U.S. v. Correll, 389 U.S. 299 (1967) with Commissioner v. Lester, 366 U.S. 299 (1961). Clearly in these alimony situations, given the existence of a matrimonial dispute and a readily verified judicial decree, the problem of enforcement is qualitatively and quantitatively easier

than that in the "overnight sleep" test case, U.S. v. Correll, supra, which involved the deductibility of numerous meals as business expenses. Temporary support payments are larger in amount and less frequent than business meals, so there is less warrant for an automatic rule anyway (although as pointed out taxpayer is really the one contending for such an automatic rule herein, not the government).

5. Sharing a residence with his then wife does not automatically preclude a taxpayer from using "head of household" rates. Petitioner's right to use the lower head of household rates for tax year 1971 involves the related question of whether plaintiff's then wife was a "member" of petitioner's "household" during 1971. If she was not, petitioner is deemed to have been unmarried in 1971

and therefore would qualify for the lower head of household rates. §§2(c) and 143(b) IRC. Head of household rates were originally enacted to give unmarried taxpayers who were responsible for the support of a dependent but who could not file joint returns a tax break. Walter J. Hein, 28 T.C. 826, 830-831 (1957). The head of household rates were in 1971, and are now, lower than rates for either single taxpayers or married taxpayers filing separate returns. §1, IRC (P.L. 91-172 §803 (a) and P.L. 95-30, 95-600, §101(a)).

Preliminarily, an interesting comparison can be noted between the language of sections 2(b)(1)(A) and (B) IRC on the one hand and section 143(b)(3) IRC on the other. Section 2(b)(1)(A) IRC requires that in head of household situations the needed dependent, if a child of the taxpayer, must be a member of the taxpayer's household, and also that the household

must be the dependent's "principal place of abode." Section 2(b)(1)(B) IRC provides that the dependent, if a parent of the taxpayer, may have a "principal place of abode" different from the taxpayer's, so long as that abode is a household maintained by the taxpayer. Congress, evidently, was promoting a policy of encouraging dependent children to live with their taxpayer parents, while not requiring dependent parents to live with their taxpayer children, as a precondition to the use of head of household rates. These two subsections thus use both the term "household" and the term "place of abode." On the other hand, §143(b)(3) IRC, applicable to this case, just as clearly uses only the term "household," and requires only that the taxpayer's spouse <u>not be a member of the taxpayer's household</u>. It does not also require that the taxpayer's spouse not live in the tax-

payer's "place of abode." Congress did not employ the term "place of abode" in the applicable statute, §143(b)(3) IRC, but only the term "household." Thus the concept of a "household" is different from the concept of a "place of abode." The cases, as shown below, clearly adumbrate this difference.

The head of household sections are entitled to a liberal reading to effectuate their above-mentioned purpose, as the Tax Court said in Robinson v. Commissioner, 51 T.C. 520 (1968):

> "Because of the nature of the statute here under consideration and lack of precise meaning for the word 'household' used therein, we consider it proper to give the statute the most favorable reasonable construction to support petitioner's right to compute his tax as head of household." (Emphasis added). (To the same effect see Reardon v. U.S., 158 F. Supp. 745, 749 (D.S.D. 1958) and Walter J. Hein, 28 T.C. 826, 832 (1957)).

In the Robinson case, separate facilities in a home for the aged furnished

to one of a number of boarders in the home were held to constitute a "household," even though it appeared that the boarder in question took his meals together with other boarders, who were members of other "households." The court noted that "...the statute...departs from the concept of 'household' as a group living under one roof..." Robinson, supra, page 539. This and other cases establish with clarity that the mere fact of residence under the same roof does not transform a group of individuals into "members" of a single "household." See also Est. of J.F. Fleming, 43 T.C. Memo (PH) 580 (1974) and John Robinson, supra.

In Fleming, supra, the Tax Court ruled that the absence of physical barriers separating two families living in the same house did not prevent a finding that the house constituted two households. Estate of Fleming, supra. The court said:

> "The extent of a 'household' is not determined solely by physical or tangible boundaries; instead we must look to all of the facts in any particular case." (Emphasis added). Page 582.

and further in the same opinion:

> "In the instant case it would be an elevation of form over substance to say that only one household existed simply because only one building was involved and certain areas were used in common." (Citing Robinson, supra, and Reardon, supra.) (Emphasis added). Page 582.

All of the above-mentioned cases interpret the phrase "member of such household" as that phrase was used in §2(b) of the Internal Revenue Code of 1954. In 1969 when Congress enacted the Tax Reform Act of 1969 to add inter alia §143(b)(3), a companion section to §2(b), Congress again employed the phrase "member of such household." Since the phrase "member of such household" was clearly a term of art, frequently interpreted by the courts prior to the Tax Reform Act of 1969, Congress must be considered to have had

in mind the meaning previously acquired by that phrase. As this Court said in Case v. Los Angeles Lumber Co., 308 U.S. 106 (1939):

> "The words 'fair and equitable' as used in Sec. 77b(f) are words of art which prior to the advent of Sec. 77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations. Hence, as in case of other terms or phrases used in that section (citations omitted), we adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary." (Bracket and emphasis added). Page 115.

Therefore taxpayer believes the court below applied an erroneous legal principle in ruling that spouses must maintain separate residences if either is to be entitled to "head of household" rates.

6. Petitioner also requests this Court to rule that the trial court's finding that no court order existed requiring petitioner to allow his then wife to live

in his house was clearly erroneous. All evidence in the record supports petitioner's testimony, and there is no evidence in the record to the contrary whatsoever. In addition, this Court may take judicial notice of the transcript of the hearing before Judge LaMacchia at which the petitioner herein was ordered to maintain his house and permit Dr. Kopenhaver, his then wife (and recipient of the alimony pendente lite payments here in issue) to live in his house. Page 47 of the appendix herein. Defendant can offer no evidence on or off the record casting the slightest doubt on this hearing transcript or on petitioner's trial testimony that the only reason Dr. Kopenhaver was present in his house during 1971, the year in question, was the existence of that court order. Petitioner believes the finding of fact made below on this issue was clearly erroneous.

CONCLUSION

WHEREFORE, petitioner respectfully requests this Court to grant the within petition and reverse and remand the decision below on the ground that erroneous legal principles were applied and erroneous findings of fact were made.

Respectfully submitted,

LORENTZ W. HANSEN
Counsel for Petitioner

APPENDIX

Section 71(a)(3) of the Internal Revenue Code

71(a) General Rule.

(1) ...

(2) ...

(3) Decree for support. If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this title from her husband under a decree entered after March 1, 1954, requiring the husband to make payments for her support or maintenance. This paragraph shall not apply if the husband and wife make a single return jointly.

Section 215(a) of the Internal Revenue Code of 1954.

215(a) General Rule. In the case of a husband described in section 71, there

shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

Section 143(b)(3)

(b) For purposes of part V, if

(1) ...

(2) ...

(3) during the entire taxable year such individual's spouse is not a member of such household, such individual shall not be considered married.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1395 - AUGUST TERM 1982

Argued: June 10, 1983
Decided: November 1, 1983

DOCKET NO. 83-6022

WILLIAM C. LYDDAN,

Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

BEFORE:

OAKES, PRATT, Circuit Judges,
and METZNER, District Judge*

Appeal from a judgment after a non-jury trial in the United States District Court for the Dictrict of Connecticut which denied appellant a tax deduction for alimony payments and denied him use of head of household tax rates to compute his personal income tax for the year 1971.

Affirmed.

LORENTZ W. HANSEN, White Plains, New York, for Plaintiff-Appellant.

JOAN I. OPPENHEIMER, Attorney, Tax Division, Department of Justice, Washington, D.C. (Michael L. Paup,

Chief, Appellate Section, Tax Division, Department of Justice, Washington, D.C., Alan H. Nevas, United States Attorney for the District of Connecticut, of Counsel), for Defendant-Appellee.

* Of the United States District Court for the Southern District of New York, sitting by designation.

PRATT, Circuit Judge:

Taxpayer William C. Lyddan appeals from a judgment of the United States District Court for the District of Connecticut, Thomas F. Murphy, Judge, which denied him a deduction under I.R.C. §215 (1976) for $7,200 in alimony payments made to his wife during calendar year 1971, and which prohibited him from using head of household income tax rates for the same year. For the reasons set forth below, we affirm the judgment of the district court.

Soon after William Lyddan and Patricia Kopenhaver were married in

February 1970 their marriage began to deteriorate. In July 1970, Kopenhaver, seeking equitable support for herself and her unborn child, sued Lyddan in Connecticut Superior Court for desertion. The court ordered Lyddan to pay his wife $600 per month as alimony pendente lite.

During 1971, despite the pending action, Lyddan and Kopenhaver lived in the same house. Although they maintained separate bedrooms and bathrooms, all entrances to the house were accessible to both, and both used the common areas on a regular basis. While they minimized their contact with each other, Lyddan and his wife occasionally shared the television room, attended social functions together, and on rare occasions had sexual intercourse.

Although Lyddan paid his wife pursuant to the court order, she refused to share

in the household expenses. Lyddan not only paid for the household food; he also shopped for it. He furnished his wife with a car and maintained it for her as well. Lyddan even named her as the beneficiary of his life insurance policy.

Lyddan filed for divorce early in 1971 and obtained a judgment in his favor in July 1972. While he did not claim an alimony deduction for the payments to his wife on his initial 1971 return, when the IRS assessed him for underpayment of 1971 taxes he filed an amended return, claiming a deduction for the alimony payments in order to make up for the deficiency. When the IRS applied two subsequent overpayments to his original deficiency, Lyddan filed two separate refund claims totaling $9,635, based primarily on the claimed $7,200 alimony deduction. IRS denied his refund claim and this action followed.

The issues raised by Lyddan, both at trial and now on appeal, are (1) whether he was separated from his wife during 1971 within the meaning of I.R.C. §71(a)(3) so as to entitle him to a deduction under I.R.C. §215 for the alimony payments he made to her; and (2) whether he should be treated as "not married" under I.R.C. §§2(c), 143(b) (1976 & Supp. I 1977), so as to entitle him to use favorable head of household rates under I.R.C. §§1(b), 2(b) to compute his personal income tax for 1971. United States Magistrate Arthur H. Latimer found that these issues involved questions of fact and denied the government's motion for summary judgment. Judge Murphy then conducted a two-day bench trial.

Lyddan testified that the only reason he permitted Kopenhaver to reside in the same house was because the alimony order required him to do so, but the

order contained no such requirement. Lyddan's son Jeffrey, who lived in his father's house during 1971, testified on his father's behalf, but the court found his testimony not worthy of belief and disregarded it. Kopenhaver also testified at trial, and the court accepted her testimony as to the instances of sexual intercourse, rejecting Lyddan's denial that they had cohabited at any time during 1971.

After reviewing the evidence in detail and making a number of subsidiary findings and determinations of credibility, Judge Murphy held that "the facts conclusively prove that the Lyddans were not separated, nor were they living apart during the calendar year of 1971 but were living together in one home, married, but with hatred and contempt for each other." Accordingly, Judge Murphy held

that Lyddan was not entitled to an alimony deduction under §215. He further found that Kopenhaver was a member of Lyddan's household during 1971, so that Lyddan could not be considered "not married" within the meaning of I.R.C. §§2(c) 143(b) and was therefore not entitled to use head of household tax rates for 1971.

On appeal, Lyddan argues that the district court's judgment should be reversed because its findings were clearly erroneous and because the court erred in not upholding appellant's claim which was based on the facts and holding in Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978). The government contends that the district court should have ruled as a matter of law that appellant was not entitled to the deduction or to the favorable tax rates, and that in any event, the court's findings were not clearly erroneous.

It is familiar law that a district court's factual findings will not be set aside on appeal unless "clearly erroneous". Fed. R. Civ. P. 52(a); see Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); Snyder v. Four Winds Sailboat Centre, Ltd., 701 F.2d 251, 253 (2d Cir. 1983), and this rule applies regardless of whether these findings are ultimate or subsidiary findings. Pullman-Standard, 456 U.S. at 287. Under these standards, the facts before us would very likely pass muster. We do not decide the point, however, because the issues on this appeal should be resolved as a matter of law, not as a matter of fact. Judge Murphy also thought that the issue should have been resolved on summary judgment based upon the undisputed fact that the residences of Lyddan and Kopenhaver were not geographically

separate. Having heard the evidence, however, Judge Murphy determined the subsidiary issues of fact and assumed that the magistrate's decision denying summary judgment, which had been adopted by Chief Judge Daly, was the law of the case. Without resolving whether Judge Murphy was obliged to defer to the prior decision denying summary judgment, we simply note that this court is not precluded from addressing the issue.

In our view, the unpleasant trial which took place before Judge Murphy was entirely unnecessary because the uncontested facts established in advance of trial that Lyddan and Kopenhaver were not separated and living apart, but instead were living in the same residence. Consequently, Lyddan was precluded from deducting alimony payments under §215 as well as from using head of household tax rates.

Section 215 allows a husband to take a deduction only for amounts includable as income to his wife under §71. Section 71(a)(3) provides that a wife's gross income includes periodic payments received pursuant to a decree requiring a husband to make such payments for his wife's support or maintenance. But this provision on its face applies only if the wife "is separated from her husband". Sydnes, 577 F.2d at 62; see S. Rep. No. 1622, 83d Cong., 2d Sess. 171, reprinted in 1954 U.S. Code Cong. & Ad. News 4621, 4805. It follows then, that Lyddan's alimony payments were deductible under §215 only if Kopenhaver was "separated from" Lyddan.

Lyddan argues that just because a husband and wife reside in the same dwelling does not preclude a finding that the wife is separated from her

husband. He relies on Sydnes, an Eighth Circuit case which held that the issue of separation presents a factual question and that circumstances may exist where a husband and wife can live separately in the same residence. The court based its conclusion on the fact that "[n]either the statute nor the regulations specifically state that in order to live separately or apart the parties cannot occupy separate quarters in the same residence." 577 F.2d at 62. We respectfully disagree with Sydnes' conclusion that a fact issue can be presented when the couple occupies the same residence.

The relevant Treasury regulations specify that §71(a)(3) applies only where husband and wife "are separated and living apart." 26 C.F.R. §1.71-1(b)(3)(i) (1983) (emphasis added). The Eighth Circuit's interpretation that "separated and living

apart" could conceivably mean living apart in the same residence is in our view an unnecessarily strained and unduly expansive reading of this regulation. We think the phrase requires a geographical separation and means living in separate residences.

Such an interpretation provides an easily recognized, quickly applied standard for the tax deduction. A federal court should not have to inquire into the intimate, sometimes sordid details of a dissolving marital relationship in order to administer federal tax policy. Sydnes v. Commissioner, 68 T.C. 170, 176 (1977), rev'd in part, 577 F.2d 60 (1978); see Metzger Trust v. Commissioner, 693 F.2d 459, 467 (5th Cir. 1982), cert. denied, 103 S.Ct. 3537 (1983). Nor should the outcome of a contested deduction depend on a factual inquiry that probes so

deeply into the intimate living details of a now-estranged couple.

The complicated and unpleasant factual scenario of the case before us, which produced a trial described by Judge Murphy as a "nightmare", clearly demonstrates the need for a clean, "bright line" test. To avoid other drawn out replays of bitterly contested divorce trials and the resolution of future similar tax issues, we hold that before an alimony deduction can be allowed under I.R.C. §215, the husband and wife must have lived in separate residences during the relevant period. We further hold that a husband cannot qualify for head of household tax status when he and his wife occupy the same residence.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WILLIAM C. LYDDAN,
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant

CIVIL ACTION B-76-394

MEMORANDUM

MURPHY, D.J.

This action against the government for refund of income taxes (28 U.S.C. §1346(a)(1) is the basis of our jurisdiction) has its genesis in an ugly misalliance and a Connecticut court order requiring plaintiff Walter C. Lyddan to "pay his wife $600.00 a month as alimony pendente lite."

The parties agreed in writing before trial that the only issues to be resolved are:

1. "Whether the plaintiff is

entitled to a deduction in the amount of $7,200.00 for the calendar year 1971 under Section 215 of the Internal Revenue Code of 1954."

and

2. "Whether the plaintiff is entitled to utilize the 'head of household' income tax rates for the calendar year 1971 under Sections 1, 2 and 143 of the Internal Revenue Code of 1954."

The alimony payment tax issue turns on the question whether plaintiff was living "separate" from his wife during 1971, and the "head of household" issue on whether plaintiff's wife was not a member of his household during the same year. The relevant Sections of the Internal Revenue Code of 1954 on the first issue are Sections 215(a), 71(a)(1-3), and

Treasury Regulation Section 1.71-1(b)(3) and (i) as set forth in the Appendix infra.

The Lyddans were married on February 26, 1970 and resided in the husband's home in Greenwich, Connecticut until the dissolution of their marriage in July of 1972. The husband was employed in an advertising firm in New York City and commuted daily. His 1971 income was $76,549. The wife practiced her profession as a podiatrist in an office in Greenwich.

The wife Patricia was the first to sue. Her complaint was filed on July 31, 1970. Claiming desertion, she sought equitable support for herself and her unborn child. On August 12, 1970 the Superior Court of Connecticut after a hearing "ordered, that the defendant pay to the plaintiff the sum of $600.00 per month as alimony pendente lite...".

The husband countered with his complaint dated September 24, 1970 seeking an annulment and custody of any after born child or children. The annulment action was withdrawn by the husband on January 18, 1971 and an action for divorce alleging extreme cruelty was filed instead the same day. Both actions were thereafter consolidated for trial, which resulted in a judgment of divorce in favor of the husband, and a judgment of dismissal of the wife's complaint, both dated July 11, 1972. The wife appealed pro se and both judgments were affirmed by the Supreme Court of Connecticut on March 19, 1974. (Lyddan vs. Lyddan, 166 Conn. 204).

Plaintiff in his individual income tax return for the calendar year 1971 did not claim any deduction for the $7,200 alimony payments he made to his wife in 1971. On July 24, 1972 the Internal

Revenue Service (IRS) filed an assessment against him in the sum of $6,636 for underpayment of taxes caused by mathematical errors in his 1971 return. He countered by filing an amended 1971 return on August 2, 1972 in which he deducted the $7,200 alimony payments. In turn the IRS on June 4, 1973 applied an overpayment of $4,440 in the husband's 1972 return to the 1971 deficiency. On July 11, 1973 plaintiff filed a claim for refund for the $4,440 which was denied. The IRS on July 24, 1974 applied a $3,020 overpayment on plaintiff's return for 1973 to the remaining deficiency on plaintiff's 1971 return. On March 15, 1976 plaintiff filed his claim for a refund of $2,089 on his 1971 return. The claim for refund was denied.

The sum of the two overpayments, $4,440 and $3,020 plus the corrected

amount of $2,175 instead of $2,089 in his 1976 claim for refund totals $9,635, the amount of plaintiff's claim in this action filed herein on December 27, 1976. (By stipulation the parties have agreed that the government will prepare the computation of the refund, if any is due.)

It is of factual interest to record a few statements that plaintiff made in his original 1971 individual return filed "on or about April 15, 1972". Under FILING STATUS he stated:

> "3. /x/ Married filing separately and spouse is also filing." (Emphasis ours)

and on Page 2 of Part 1 ADDITIONAL EXEMPTIONS, Line 32a he stated:

> "Jessie Agnes Lyddan, mother"
>
> Line 32c: "months lived in your home - 12"
>
> Line 32e: "amount you furnished for dependent's support - $3,700."

There was not a word of testimony at

trial that plaintiff's mother lived in his house in 1971 or that he furnished any amount for her support.

In plaintiff's amended 1971 return under FILING STATUS CLAIMED ON ORIGINAL RETURN he stated: "single" (Emphasis ours). Also of interest in his amended 1971 return, Part II under the title EXPLANATION OF CHANGES he stated:

> "Taxpayer was legally separated from wife, Tricia Lyddan on September 21, 1970."
> (Emphasis ours)

There was no legal separation during 1970 or 1971.

It should also be noted that plaintiff's original 1971 return was prepared and signed by a professional, Everyman Tax Service, Inc. and that plaintiff testified he told Mr. Sand of that company that he had made such alimony payments.

On March 25, 1981, Magistrate Latimer denied the government's motion

for Summary Judgment holding that both issues (the deduction of $7,200 alimony payments and the "head of household" tax rates) presented questions of fact and the Honorable T.S. Gilroy Daly, District Judge, "so ordered".

The Magistrate rejected the government's argument that the Lyddans living in their home for the entire year of 1971 were not living separate and apart as a matter of law. Citing Sydnes vs. Commissioner 577 F2d 60, 62-63 (8th Cir., 1978), he opined that "a factual inquiry into whether a couple is indeed 'living apart' while under the same roof need not be fanciful, complex or obscure."

After hearing the Lyddans testify for two days we are compelled to say that the Magistrate was indeed fortunate to have had only written material before him.

Although we disagree with the order denying the government's motion for Summary Judgment, we have assumed that the order of Judge Daly adopting the Magistrate's decision is "the law of the case"[3] and we address those issues of fact for resolution.

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[3] As to the "law of the case", Judge Learned Hand in his inimitable style devoted considerable time and scholarship to this hoary phrase by posing the question and giving the answer in Dictaphone Products v. Sonotone Corp, 230 F2d 131 (2nd Cir., 1956). "The question (he said) is the doctrine described by that phrase an inflexible rule of law, or only a cautionary admonition to be applied when the occasion demands it?" Relying on the language in Messinger v. Anderson, 225 U.S. 436, 442 (1912) and U.S. v. U.S. Smelting, Refining & Min. Co., 339 U.S. 186, 198 (1950) relating to such issue when before an appellate court, Judge Hand concluded: "So far therefore as our original opinion must be read as meaning that the question is not one of discretion, and that on no occasion may the second judge reconsider a ruling of the first judge, we now overrule it;..." id. at 136, Accord, Corporacion de Mercadeo Agricola v. Mellon Bank, 608 F2d, 43, 48 (2nd Cir., 1979).

We start with the premises: that the assessment of the Commissioner is presumed to be correct; Helvering v. Taylor, 293 U.S. 507 (1935); that plaintiff's burden of proof was (1) that he lived "separate" from his wife in the same residence during the year 1971 and (2) that he was "head of household" during that year; Compton v. U.S., 334 F2d 212, 216 (4th Cir., 1934).

The two day trial of the stipulated tax issues was in substance, and indeed in fact, a verbatim replay of the bitter and vulgar consolidated trial for desertion and support on the one hand, and divorce for extreme cruelty on the other. It was a nightmare for a female reporter to record and transcribe.

There was no dispute at trial that in the calendar year 1971 the parties

lived in the home that the husband built and owned in Greenwich, Connecticut. It was the only home of each from the date of their marriage, February 26, 1970 until the decree of divorce in July of 1972. There was also no dispute that during all of 1971 the husband and wife had separate bedrooms and bathrooms in this same house. Except when the husband was out of the state on "business" during 1971, they both lived part of each day in that home, for during the usual business hours Monday through Friday they each worked, she at her profession and he in New York City.

The house in Greenwich was of two floors. On the first floor was a living room, library, dining room, family room, kitchen, laundry room and garage. On the second floor, there were

four bedrooms and three baths. There was only one telephone with extensions (and not two separate numbered telephones). There was no testimony or other proof that any part of the house, or any room, or the garage was not readily accessible to the wife during any part of 1971. Plaintiff's adult son, Jeffrey, specifically testified that all three entrances were accessible to her. In 1971 the same son, Jeffrey, lived in the house while attending high school in Greenwich from January to September when he then matriculated at a different school and boarded there.

Patricia Lyddan, also known as Doctor Kopenhaven, was 53 at the time of the trial. She received a MA degree from Columbia in 1956 and a degree in pediatric medicine from the University of New York in 1963. She

had been married three times prior to her marriage to plaintiff. Plaintiff was 62 at the time of trial and had been married once before. His education was not disclosed.

Jeffrey Lyddan the plaintiff's now 36 year old son and a California attorney, testified first and corroborated in advance plaintiff's subsequent testimony of some of the bizarre actions and statements of his stepmother, Mrs. Lyddan, during the years 1970-1972 when he was a high school student. Regretfully we find his testimony unresponsive and untrustworthy but thoroughly rehearsed and accordingly we have disregarded it. Plaintiff's testimony roamed and rambled through many years prior and subsequent to 1971. It covered his first marriage of 26 years and its progeny, the death of his wife

on January 26, 1969, his whirlwind courtship of and marriage to Patricia Kopenhaven on February 26, 1970 in St. Patrick's Cathedral, her apartment on Sutton Place in New York City, a dinner at El Morocco, a "2+ carat diamond ring" replaced with a 5-6 carat diamond ring for $7,000+, talk of a prenuptial agreement like Barbara Hutton's, 26 million dollars in Canadian oil, a "trust fund for her in her 'natural' life", his "sugar bowl" concept of putting his money and hers into a sugar bowl to "live out our lives", to which Doctor Kopenhaven replied, "You are a fraud, etc., etc..." This was only the beginning of a long day of testimony and some part of the next day. It covered events, arguments, incidents, money matters, law suits, court orders, vulgarities, an indictment of plaintiff

(later dismissed), annulments (civil and religious), injunctions, allotment of space in two refrigerators for food, domestic help, police assistance, the consolidated matrimonial trial, ad nauseum, even the smashing of a glass Wedgewood vase. In plaintiff's brief filed two and a half months after trial under the title "CONCISE STATEMENT OF FACTS", 30 pages are devoted to that avowed purpose.

In addition to the undisputed facts relating to the house itself, the Lyddans at home in 1971 ate separately, keeping their food in separated spaces of two refrigerators. They also occasionally shared the family room viewing TV but Mrs. Lyddan didn't watch TV but only stared at the plaintiff. However, on the evening of December 31, 1970 and into the morning

of January 1, 1971 they jointly entertained mixed company at their house at a New Year's Eve party for which the plaintiff husband paid. Again on August 18, 1971, Mrs. Lyddan's birthday, a sitdown dinner was served in the house for friends of Mrs. Lyddan at which the plaintiff also sat. And on at least two other occasions during 1971 in the company of each other, they attended social functions; one a local ball in Greenwich and the other a reception during a football game in New York City in company with other advertising people. At home during 1971 they ate separately, although early that year on January 24, 1971 they ate dinner together at home without incident.

There is no doubt that for most of the year 1971 the Lyddans were at daggers point, antagonistic and bitter

toward each other (two law suits were boiling simultaneously on the back burner). Yet they managed to suffer each other day after day, night after night.

A revealing insight into this strange menage and plaintiff's claim of "being separated" is his testimony that he not only paid for the food they had, but he was the one who shopped for it each week. He also swore that he furnished his wife with an automobile and maintained it, and also maintained an insurance policy on his life with his wife as beneficiary. In addition, he testified that the alimony court order required the parties to live in the same house and that was the only reason he permitted his wife to reside therein. There was no such requirement in the order. The complete decretal

part of the alimony order dated August 12, 1970 is as we have noted it. Ante P.2. We suspect the plaintiff's testimony was fashioned on the Sydnes case infra, where the divorce court in Iowa ordered that the parties continue to reside in their house during the pendency of the law suit. One disputed fact remains. Plaintiff testified that he had no sexual intercourse with his wife during the year 1971. His wife testified that he did although she added "not frequently" and "however, when she first met him, he was on the verge of being impotent". On rebuttal plaintiff again denied having intercourse that year but did not deny the charge of impotency. On balance I accept the wife's testimony on this sex issue.

We assume most adults would agree

that there must be thousands of married couples in this country alone who live in the same house or the same apartment or the same trailer without speaking, without sex, without love, day after day, month after month - for some reason - jealousy, money, mother-in-law, drinking, unfaithfulness, religious differences, or any of the other ills to which we humans are heir to, but not separated. Money we would guess is reason numero uno. Plaintiff's 1971 return indicates that he claimed cash contributions on two churches during that taxable year - one for $65 and the other for $50.

The sum total of the facts as we have found them herein is that the facts conclusively prove that the Lyddans were not separated, nor were they living apart during the calendar year of 1971 but were living together in one home, married,

but with hatred and contempt for each other.

On the remaining issue of fact whether plaintiff is entitled to use the lower "head of household" rates for 1971, both parties agree that this depends on whether Mrs. Lyddan was not a member of plaintiff's household during that year.[4]

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[4] The requirements for the use of the lesser "head of household" rates are found in Internal Revenue Code of 1954, Sections 2(b) and (c), 143(b) and Treasury Regulation 1.143-1(b)(5) infra.

Section 2(b)(1) requires generally that the taxpayer be "not married" with these enumerated exceptions. Section 2(b)2(B) provides that an individual who is legally separated by a decree of divorce or separate maintenance or (2)(c) if considered not married under Section 143(b).

Section 143(b) delineates three situations which are considered "not married". The third with which we are concerned requires that during the entire tax year said person's spouse is not a member of the taxpayer's household.

Treasury Regulation 1.143-1(b)(5) in referring to Section 143(b)(3) states "an individual's spouse is not a member of the household during a taxable year if such household does not constitute such spouse's place of abode at any time during such year."

As the summary statement of the facts record, Mrs. Lyddan lived day after day of the entire year of 1971 in the taxpayer's home in Greenwich as his legally married wife. For 9 months the household was plaintiff, his wife, and son, Jeffrey - for 12 months it was the plaintiff and his wife. Plaintiff's submission does not contest these facts but argues that the "social isolation between this couple" and "the consideration that plaintiff's wife's presence in the house was enforced by court order" and "that [she] refused to share expenses or economically (sic) to his household...Doctor Kopenhaven was an unwelcome presence in the house, not a "member" of the household."

Such argument belies the facts. The wife's presence was not enforced by court order. This statement is "borrowed" from the court order in Sydnes supra. Social

isolation is pure hyperbole. Hatred and contempt, yes, but these characteristics were mutually shared. In public and in company with others in their home, the Lyddan's concealed their true feelings. We refrain from commenting on the wife's refusal to share expenses of household except to add that there was no proof of the wife's income or assets but accepting as true the argument's assumptions they do not negate that plaintiff's household in his Greenwich home during 1971 consisted of himself, his wife, and son, Jeffrey.[5]

From these undisputed facts that we have delineated we find it to be fact that Mrs. Lyddan, wife of plaintiff, was a member of plaintiff's household during

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[5] Websters Third New International Dictionary (1981) P. 1096 defines household as: "those who dwell under the same roof and compose a family: a domestic establishment; specif. a social unit comprised of those living together in the same dwelling place."

the calendar year of 1971 and plaintiff's home was her only abode during that year. We conclude, therefore, that plaintiff is not entitled to use the "head of household" rates for that year because he cannot be considered "not married" for the purposes of Section 2(b)(1) infra under either Section 2(b)2(B) or Section 2(c) infra and 143(b) of Treasury Regulation 1.143-1(b)(5) infra.

The cases cited by the plaintiff on this issue involve tax years preceding the Tax Reform Act of 1969. Section 2(c) and Section 143(b)(3) were added to the Internal Revenue Code of 1954 by that act. P.L. 91-172, 91st Cong., 1st Sess.

Accordingly, we dismiss the complaint for failure of proof on both issues and direct the Clerk to enter judgment for defendant on both issues with costs and that the plaintiff take nothing.

The issues of fact having been resolved, we feel justified in expressing our opinion that on all the undisputed facts plaintiff's claim should have been dismissed as a matter of law on the government's motion for Summary Judgment and in this trial.

The problem has arisen because of Sydnes v. Commissioner 577 F2d 60 (8th Cir., 1978), which, with deference, we believe was wrongly decided for two reasons: (1) without finding the Tax Court's findings of fact clearly erroneous, the Sydnes court proceeded to make its own findings contrary to U.S. v. U.S. Gypsum Co., 333 U.S. 364, 394-395 (1948); Hearn v. Commissioner, 309 F2d 431 (9th Cir., 1962) cert. denied 373 U.S. 909 (1963) and Young v. C.I.R., 268 F2d 245 (9th Cir., 1959), and (2) the Tax Court's opinion in Sydnes v. Commissioner, 68

T.C. 170, 173-176 (1977) was deserving of high praise and commendation for its excellence and original research in this occult field of law and today is now the cited authority of the majority of all the Tax Court judges.

In Washington v. Commissioner, 77 T.C. 601 (1981) that majority held:

> "What the word 'separated' means for purposes of the alimony deduction is not entirely clear. In Sydnes v. Commissioner, 68 T.C. 170, 173-176 (1977), this Court reasoned that a husband and wife involved in divorce proceedings, but still living in the same house, were not 'separated,' emphasizing the language contained in section 1.71-1(b)(3), Income Tax Regs., that they must be 'separated and living apart.' After reviewing the pertinent legislative history, we said (68 T.C. at 175-176):
>
> 'The statutory history of the 1954 changes emphasizes that the factual status of whether the parties are separated rather than their marital status under local law is the key in determining whether amounts paid under a court order are includable in the recipient's gross income and deductible by the payor. See S. Rept. No. 1622, 83d Cong., 2d Sess. 10 (1954). We conclude that

'separated' as used in the statute and 'separated' as used in the regulations mean living in separate residences. Only when living in separate residences do the parties incur the duplicate living expenses normally incurred by divorced or separated couples. In the absence of such duplication, and in the absence of any legislative history cited to us which expressly elucidates what Congress intended, we find it hard to believe that a mere continuation of shared living expenses following estrangement was intended by Congress to generate a deduction when the identical expenses would have been unavailable to the husband as a deduction before the estrangement took place. Moreover, the Court should not be required to delve into the intimate question of whether husband and wife are in fact living apart while residing in the same house. We therefore conclude that petitioner and Lugene were not separated during the period from April 1 to July 9, 1971, and that petitioner is not entitled to a deduction under section 215 for the temporary support payments made to Lugene.'

But the Court of Appeals for the Eighth Circuit, in reversing the Tax Court on this issue (577 F2d 60), held that the requirements that the parties be 'separated and living apart' may be met as a factual matter, even though they occupy the same residence, provided they occupy separate quarters. (footnote omitted)

> We respectfully disagree with the Court of Appeals for the Eighth Circuit. It is our view Congress intended that a husband and wife should not be treated as 'separated and living apart' when both are living under the same roof. See H. Rept. 1337, 83d Cong., 2d Sess. 9-10 (1954); S. Rept. 1622, 83d Cong., 2d Sess. 10-11 (1954). Consequently, we will adhere to the rationale of our prior opinion in Sydnes."

The original Tax Court decision in Sydnes was authored by Judge Cynthia H. Hall, now United States District Judge, Central District of California.

We would also argue that the Eighth Circuit should have deferred to the Treasury Regulation implementing the Statute (requiring that the husband and wife be "separated and living apart"). Treasury Regulation 1.71-1(b)(3)(i). National Muffler Dealers Association v. U.S., 440 U.S. 472, 476-477 (1979). We would submit that such regulation to the average adult means geographical

separation.

Let this memorandum stand as our findings of fact and conclusions of law pursuant to Fed. R. Civ. P.52.

/s/ Thomas F. Murphy
Thomas F. Murphy
Senior United States District Judge

October 22, 1982

UNITED STATES COURT OF APPEALS

For the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of November one thousand nine hundred and eighty-three.

Present: (83-6022)

HON: JAMES L. OAKES

HON: GEORGE C. PRATT Circuit Judges

HON: CHARLES M. METZNER District Judge

WILLIAM C. LYDDAN,

Plaintiff-Appellant,

v. 83-6022

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District

Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. Daniel Fusaro,
Clerk

/s/ Edward J. Guardaro

by Edward J. Guardaro,
Deputy Clerk

* Of the United States District Court for the Southern District of New York, sitting by designation.

SUPERIOR COURT : FAIRFIELD COUNTY AT STAMFORD

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PATRICIA E. LYDDAN, :

Plaintiff, :

Vs. : No. 15696

WILLIAM C. LYDDAN, :

Defendant. :

----------x

September 25, 1970

Before: HON. OTTO H. LaMACCHIA, Judge

Appearances:

For the Plaintiff:

TIERNEY, ANTHONY & WHELAN, ESQS.
BY: KEVIN TIERNEY, ESQ.

For the Defendant:

HIRSCHBERG PETTENGILL & STRONG, ESQS.
BY: WILLIAM T. CAHILL, ESQ.

FAMILY RELATIONS

NATHAN A. GOLDFARB,
Official Court Reporter

(Colloquy recorded but not transcribed.)

THE COURT: Then it is my understanding from your representation, Mr. Cahill, that Mr. Lyddan will pay the mortgage payments, taxes, assessment, insurance, all utilities, maintenance, repairs, and so forth, on the house -- keep up the house.

Hospitalization policy, I presume, he would have to keep up for his own protection and of the wife; the use of the car that she now has together with the cost of upkeep of the car. In addition thereto, that he will pay the allowances that are set forth on Page 2 of the affidavit of Mrs. Lyddan outside of food because they are going to live together and he has to feed both of them. Clothing, laundry, household supplies. I don't know what transportation is. What is the transportation item in this?

MR. TIERNEY: That's taken care of.

You have already mentioned that, your Honor. I think that ought to be excluded.

THE COURT: Doctor and dentist, drugs, life insurance premiums.

Well, the rest of it I can put in a lump sum as far as this as an allowance.

He will take care of all those, did I understand your statement?

MR. CAHILL: That's correct, your Honor.

THE COURT: What are you shaking your head about, Mr. Lyddan? If you want to speak, speak to your attorney.

MR. TIERNEY: Your Honor, I believe his affidavit also includes the expenses that he presently incurs for Mrs. Lyddan so that is included in there. Even after that, there is over four hundred dollars extra.

THE COURT: I got to that point and I stopped. He's been shaking his head.

MR. CAHILL: Your Honor, he will pay the things as shown in the affidavit with the exception of what Mr. Tierney indicated a minute ago as to transportation.

THE COURT: The car, I gave her the car. She's got the car.

MR. CAHILL: Right.

He will pay for those items shown on there with the exception of entertainment, contributions and donations and miscellaneous personal expenses.

THE COURT: And in addition thereto --

MR. CAHILL: Will give her an allowance to take care of those things.

THE COURT: That's what I wanted to make sure of.

(Further colloquy recorded but not transcribed.)

THE COURT: All right. With that understanding, in addition thereto of what we have already agreed to -- how does he get paid? Monthly?

MR. CAHILL: Twice a month.

THE COURT: It will be paid at the rate of $600 a month payable semi-monthly, in addition thereto.

MR. CAHILL: In other words, your Honor, you have added $200 on what we offered to do on the allowance?

THE COURT: That's exactly what I said, in addition to what you agreed to pay.

MR. CAHILL: Right, the things for the house and so on.

THE COURT: And so forth.

MR. TIERNEY: And the food.

THE COURT: He has to supply food.

MR. CAHILL: There is no question about that.

THE COURT: There is no question about supplying food.

(Further discussion recorded but not transcribed.)

MR. TIERNEY: There is a motion for counsel fees. May that go off without prejudice. We are going to be back in next month. Mrs. Lyddan has been served with a writ for annulment, sir.

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UNITED STATES TAX COURT
Washington, D.C. 20217

April 9, 1982

Chambers of
HOWARD A. DAWSON, JR.
Judge

Mr. Lorentz W. Hansen
175 Main Street
White Plains, New York 10601

Dear Mr. Hansen:

I appreciated receiving a copy of the brief you filed in Lyddan v. United States, Civil Action No. B-76-394, on the issue of whether a husband and wife are "separated" for purposes of sections 71(a)(2) and 71(a)(3) when both are living in the same house.

You certainly wrote an excellent brief. This is a vexing and controversial issue and your analysis may be correct. As you know, the Tax Court has struggled with the issue. See Washington v. Commissioner, 77 T.C. 601 (1981), and the dissenting opinions at pages 605 to

608; and Hertsch v. Commissioner, T.C. Memo. 1982-109 (March 4, 1982). I am sure there will be future litigation. Although I adopted the opinion of Special Trial Judge Caldwell in the Washington case, in which we relied on our prior Sydnes opinion, the result is by no means free from doubt. Perhaps if we had been writing on clean slate, the conclusion and reasoning may have been different. I think some of the points made in your brief are persuasive.

Good luck in handling the Lyddan case.

Sincerely yours,

/s/ Howard A. Dawson, Jr.

Howard A. Dawson, Jr.
Judge